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No. 90-803

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN DOE, PETITIONER

v.

H. LAWRENCE GARRETT, III
SECRETARY, DEPARTMENT OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether uniformed members of the armed services may bring private actions under the Rehabilitation Act of 1973.

2. Whether petitioner was deprived of procedural due process by a directive of the Secretary of Defense providing that reservists who are carriers of the AIDS virus are ineligible for extended periods of active duty.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 903 F.2d 1455. The opinion of the district court (Pet. App. 36a-64a) is reported at 725 F. Supp. 1210.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1990. A petition for rehearing was denied on August 17, 1990. Pet. App. 65a-67a. The petition for a writ of certiorari was filed on November 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner enlisted in the Navy in 1972. Except for a brief period in 1975, he served continuously until 1977. Petitioner enlisted in the Naval Reserve in 1981 and served until January 1985. In July 1985, he reenlisted in the Naval Reserve for a period of two years. Petitioner also applied for and was admitted to the Naval Reserve Canvasser Recruiter (NRCR) program as a temporary active-duty petty officer assigned to assist in the Navy's recruiting efforts. Pet. App. 2a-3a. The NRCR program "is not a career program." Pet. App. 27a (quoting Naval Military Command Instruction 1001.1B). Assignments to the program are for a temporary period of 180 days, one year, or two years, and retention beyond the initial period "is not implied or guaranteed." *Ibid.* Petitioner initially was assigned to the NRCR program from November 25, 1985 through May 31, 1986. Pet. App. 41a. Thereafter, his service as a recruiter was extended until September 30, 1986. *Id.* at 41a-42a.

On July 20, 1986, petitioner was admitted to the naval hospital in Portsmouth, Virginia, because he had tested positive as a carrier of the AIDS virus, also known as Human Immunodeficiency Virus (HIV). Pet. App. 3a. A physical examination confirmed the presence of HIV antibodies, but determined that petitioner was otherwise in good health. *Id.* at 42a.

On August 26, 1986, after he had returned to his regular duty, petitioner was advised that he would not be continued on active duty after September 30, 1986. Pet. App. 43a. The next day, because of an administrative error, petitioner initially was permitted to extend his active duty status to September 30, 1987. *Ibid.* Later that day, however, the extension was cancelled. *Ibid.* On September 30, 1986, petitioner was released from active duty and returned to inactive reserve status. *Ibid.*

2. On September 22, 1986, petitioner filed an action alleging that his release from active duty violated Sections 501 and 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 390, 29 U.S.C. 791, 794, as amended, and the Due Process Clause of the Fifth Amendment. The district court denied his motion for a preliminary injunction and directed him to exhaust his administrative remedies. Pet. App. 43a-44a.

a. Petitioner then sought relief from the Board for Correction of Naval Records (BCNR). Pet. App. 44a. Before the BCNR, petitioner contended that his release violated a 1985 naval directive providing that "[m]embers who are HTLV-III antibody positive who demonstrate no evidence of progressive clinical illness or immunologic deficiency shall be retained in naval service." *Ibid.* The BCNR agreed with petitioner that the 1985 directive prohibited his release from active duty solely because he tested positive for the AIDS virus. Accordingly, the BCNR recommended that petitioner's naval records be corrected to show that he served on active duty until September 30, 1987, when he was transferred to the inactive reserve. Pet. App. 51a-52a. The Secretary of the Navy accepted the BCNR's recommendation and awarded petitioner backpay. *Id.* at 45a.

b. After the Secretary of the Navy accepted the BCNR's recommendation, petitioner sought further relief in the district court. He contended that (1) the policy announced in an April 1987 memorandum of the Secretary of Defense violated the Rehabilitation Act;[1] (2) the Navy had an obliga-

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[1] On April 20, 1987, while petitioner's case was before the BCNR, the Secretary of Defense issued a memorandum providing that "[r]eserve component members with serologic evidence of HIV infection are ineligible for extended active duty (duty for a period of more than 30 days) except under conditions of mobilization." Pet. App. 57a. The April 1987 memorandum "effectively supersede[d]" the 1985 directive on which petitioner had relied before the BCNR. *Ibid.*

tion under the Rehabilitation Act to implement an affirmative action plan for personnel handicapped by AIDS; (3) the Navy had violated petitioner's due process rights; and (4) he was entitled to attorney's fees and costs. Pet. App. 6a-7a.

On May 4, 1989, the district court entered summary judgment for the government. Pet. App. 36a-64a. The district court concluded that the Rehabilitation Act does not apply to uniformed members of the armed forces; that, under *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971), the court was precluded from reviewing the constitutionality of the Navy's personnel decision; and that, even if such review were not precluded, petitioner had failed to show that he was deprived of a constitutionally protected property or liberty interest. The district court also denied petitioner's request for attorney's fees and costs.

3. The court of appeals affirmed. Pet. App. 1a-35a. The court began its analysis by recognizing (Pet. App. 17a) that some courts of appeals have held that Section 501 provides the exclusive means by which federal employees may sue the government under the Rehabilitation Act.[2] The court

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[2] Section 501(b) provides:

> Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees with handicaps are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate

nevertheless ruled, following *Prewitt* v. *United States Postal Service*, 622 F.2d 292 (5th Cir. 1981), that federal employees may bring private actions under Section 504[3] as well as under Section 501. Pet. App. 20a n.10. The court held, however, that neither Section 501 nor Section 504 authorizes private actions by uniformed members of the armed forces. Section 501 affords plaintiffs the "remedies, procedures, and rights" of Section 717 of Title VII, 42 U.S.C. 2000e-16.[4] As the court noted (Pet. App. 9a), the courts of appeals have uniformly held that Title VII does not apply to uniformed members of the armed forces.

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hiring, placement, and advancement opportunities for individuals with handicaps.

29 U.S.C. 791(b).

[3] Section 504(a) provides in part:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. 794(a).

[4] The 1978 amendments provide, in part:

(1) The remedies, procedures, and rights set forth in Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) shall be available, with respect to any complaint under [Section 501], to any employee or applicant for employment aggrieved by the final disposition of such compliant, or by the failure to take final action on such complaint.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of assistance under [Section 504].

29 U.S.C. 794a(a).

Section 504 affords plaintiffs "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964." 29 U.S.C. 794a(a)(2). The court of appeals observed (Pet. App. 17a-18a), however, that those courts that have permitted federal employees to bring actions under Section 504 uniformly require them to exhaust their administrative remedies, just as if they had proceeded under Section 501. The court went on to note that "it would be incongruous to allow uniformed military personnel to bring discrimination claims against the military based on handicap when statutory claims based on sex, race, religion, or national origin are barred." *Id.* at 21a. Accordingly, the court held that petitioner's claim was barred under Section 504 as well as Section 501.

The court also held that petitioner had no claim under the Due Process Clause of the Fifth Amendment. The court found it unnecessary to "consider at any length the district court's initial finding that [petitioner's] claim is unreviewable" because the "due process claim so clearly fails on the merits." Pet. App. 30a. The court noted that petitioner's counsel had stated at oral argument that petitioner no longer sought damages on the due process claim, and that injunctive relief could relate only to petitioner's exclusion from reenlistment in the NRCR program. *Id.* at 25a-26a. The court concluded (*id.* at 26a) that "[t]he Navy's refusal to reenlist [petitioner] in the NRCR program does not impinge on any constitutionally protected property interest" because no statute, regulation or contract provides the predicate for a constitutionally protected expectation of continued military employment. The court held (Pet. App. 28a) that petitioner's "claim to a protected liberty interest is equally without merit," because petitioner has never disputed that he does in fact carry HIV antibodies.[5]

[5] The court of appeals also rejected petitioner's contention that the Navy was equitably estopped from denying him reassignment to the

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The courts below correctly held that uniformed members of the armed services may not bring private actions under the Rehabilitation Act.

a. As originally enacted, the Rehabilitation Act contained no private right of action for federal employees. The 1978 amendments to the Act provided, however, that the "remedies, procedures, and rights" of Section 717 of Title VII "shall be available" in suits brought under Section 501 of the Rehabilitation Act. 29 U.S.C. 794a(a)(1). Federal employees generally may bring suit against the government under Section 717 of Title VII, see 42 U.S.C. 2000e-16, and therefore may also sue the government under Section 501 of the Rehabilitation Act. But the courts of appeals consistently have held that Title VII does not authorize private suits against the government by uniformed members of the armed services. See *Roper* v. *Department of the Army*, 832 F.2d 247,248 (2d Cir. 1987); *Stinson* v. *Hornsby*, 821 F.2d 1537, 1539, 1541 (11th Cir. 1987), cert. denied, 488 U.S. 959 (1988); *Gonzalez* v. *Department of the Army*, 718 F.2d 926, 927-929 (9th Cir. 1983); *Johnson* v. *Alexander*, 572 F.2d 1219, 1224 (8th Cir.), cert. denied, 439 U.S. 986 (1978). The courts have concluded that the language of Section 717 of Title VII authorizing employees in the "military departments" to bring suit does not apply to uniformed members of the armed services. Instead, the courts have concluded that Congress "intended a distinction between 'military departments' and 'armed forces,' the former consisting of

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NRCR program. Pet. App. 32a-35a. Petitioner has not raised the estoppel issue in his petition for certiorari.

civilian employees, the latter of uniformed military personnel." *Gonzalez*, 718 F.2d at 928. See also *Johnson*, 572 F.2d at 1224 & n.5; *Roper*, 832 F.2d at 248. Since uniformed members of the armed services may not bring suit under Title VII, they also may not bring suit under Section 501. In view of these authorities, petitioner has abandoned his claim under Section 501.

b. The court of appeals correctly rejected petitioner's contention that he is entitled to pursue a private action under Section 504. As an initial matter, several courts of appeals have concluded that Congress intended Section 501 to provide the exclusive remedy for federal employees under the Rehabilitation Act, and that therefore federal employees (and, *a fortiori*, uniformed service members) may not bring suit under Section 504. See *Johnston* v. *Horne*, 875 F.2d 1415, 1420 (9th Cir. 1989); *Johnson* v. *United States Postal Service*, 861 F.2d 1475, 1477 (10th Cir. 1988). See also *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 626-627, n.1 (1984) (Section 501 "governs the Federal Government's employment of the handicapped"); *McGuinness* v. *United States Postal Service*, 744 F.2d 1318, 1321 (7th Cir. 1984) (finding "great merit" in the view that "section 504 is inapplicable to federal employment"); *Milbert* v. *Koop*, 830 F.2d 354, 357 (D.C. Cir. 1987) ("strongly suggest[ing] that in the future, plaintiffs * * * seek relief under section 501 rather than section 504"). In our view, these decisions are correct. As Judge Posner observed in *McGuinness*, "it is unlikely that Congress, having specifically addressed employment of the handicapped by federal agencies (as distinct from employment by recipients, themselves nonfederal, of federal money) in section 501, would have done so again a few sections later in section 504." 744 F.2d at 1321.

Some courts of appeals—including the court of appeals in this case—have concluded that federal employees may bring suit under Section 504 as well as Section 501. *Smith* v. *United States Postal Service*, 742 F.2d 257, 260 (6th Cir. 1984); *Prewitt* v. *United States Postal Service*, 662 F.2d at

304. Although the courts of appeals are thus in disagreement over whether Section 501 is the exclusive provision under which federal employees may bring private actions under the Rehabilitation Act, this case is not an appropriate vehicle for resolving that disagreement. While the court of appeals concluded that federal employees may bring private suits under Section 504, it further concluded that uniformed members of the armed services—such as petitioner—may not. Thus, a determination that Section 501 provides the exclusive means for federal employees to sue under the Rehabilitation Act would not alter the result in this case.

Petitioner bases his Section 504 argument on Congress's determination that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [are] available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section [504] of this [Act]." 29 U.S.C. 794a(a)(2). This statutory language is not as helpful to petitioner as he suggests. First, the defendants in this action are the Secretary of the Navy and the commander of the Naval Air Reserve in Jacksonville, Florida. See Pet. App. 36a. Neither individual is a "recipient of Federal assistance" or a "Federal provider of such assistance" within the ordinary meaning of those words. More generally, Title VI itself does not afford a remedy for programs administered directly by the federal government rather than through a state or local intermediary. See *Soberal-Perez* v. *Heckler*, 717 F.2d 36, 38 (2d Cir. 1983) (Title VI applies only "where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary"), cert. denied, 466 U.S. 929 (1984). See also *United States Dep't of Transp.* v. *Paralyzed Veterans of America*, 477 U.S. 597, 605-606 (1986). In addition, Title VI, unlike Title VII, does not even authorize private actions by employees in the "military depart-

ments."[6] Even in the context of Title VII, the courts have properly "refuse[d] to extend a judicial remedy for alleged discrimination in civilian employment to the dissimilar employment context of the military, especially given the need for deference to the military in matters involving hierarchy and structure of command." *Roper*, 832 F.2d at 248. Finally, petitioner's argument is inconsistent with the structure of the Rehabilitation Act. "[I]t is unlikely that Congress, having specifically addressed employment of the handicapped by federal agencies * * * in section 501, would have done so again a few sections later in section 504." *McGuinness*, 744 F.2d at 1321. And as the court of appeals observed (Pet. App. 21a):

> Just as it would be incongruous to require persons claiming discrimination on grounds of sex, race, religion, or national origin—but not handicapped discrimination claimants—to follow Title VII procedures in suing federal employers, so it would be incongruous to allow uniformed military personnel to bring discrimination claims against the military based on handicap, when statutory claims based on s[illegible]race, religion, or national origin are barred.

The court of appeals correctly declined to attribute such an aberrant statutory design to Congress.[7]

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[6] Indeed, Title VI does not expressly authorize any private actions. In *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582 (1983), a majority of this Court expressed the view that a private plaintiff can recover backpay under Title VI. See *Darrone*, 465 U.S. at 630-631 & n.9. Here, however, petitioner is contending that Title VI allows uniformed members of the armed services to bring private actions against the federal government for injunctive relief.

[7] Petitioner also suggests (Pet. 15-17) that Congress intended the Rehabilitation Act to apply to the uniformed members of the armed forces, even though it did not intend for Title VII to apply to such persons, because "[o]nly [the Rehabilitation Act] acknowledges in some

c. The result reached by the court of appeals is reinforced by other statutes concerning uniformed members of the armed forces. Congress has provided that the Service Secretaries shall exercise "all powers, functions, and duties incident to the determination * * * of (1) the fitness for active duty of any member of an armed force under his jurisdiction * * * [and] (3) the suitability of any member for reappointment, reenlistment, or reentry upon active duty in an armed force under his jurisdiction." 10 U.S.C. 1216(b). In addition, the Secretary of the Navy has broad authority, "[e]xcept as otherwise provided by law," to "prescribe physical, mental, moral, professional, and age qualifications for the enlistment of persons as Reserves of the armed forces under his jurisdiction." 10 U.S.C. 510(b). And "the Secretary * * * may at any time release a Reserve * * * from active duty." 10 U.S.C. 681(a). These specific grants of authority concerning uniformed members of the armed services prevail over the more general provisions of the Rehabilitation Act. See *Traynor* v. *Turnage*, 485 U.S. 535, 547-548 (1988); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976). The courts below correctly concluded that, in enacting the Rehabilitation Act, Congress did not intend to withdraw its broad grant of authority to the armed forces to establish physical and mental qualifications for its members in uniform. See *Smith* v. *Christian*, 763 F.2d 1322 (11th Cir. 1985).

d. Petitioner's reliance (Pet. 12-14) on *Consolidated Rail Corp.* v. *Darrone*, *supra*, and *Alexander* v. *Choate*, 469 U.S. 287 (1985), is misplaced.

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cases that discrimination is permissible, if a handicapped person absolutely cannot perform a job duty." *Id.* at 16. But Title VII, like the Rehabilitation Act, does not require employment of persons who are unqualified for the job. See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

In *Darrone*, this Court concluded that Title VI's limitation to employment practices "where a primary objective of the Federal financial assistance is to provide employment," 42 U.S.C. 604, does not apply to the Rehabilitation Act because the language and legislative history of the Rehabilitation Act do not indicate that Congress intended such a limitation. 465 U.S. at 631. This Court relied in *Darrone* on the fact that the agency responsible for coordinating enforcement of Section 504 "from the outset has interpreted that section to prohibit employment discrimination by all recipients of federal financial aid, regardless of the primary objective of that aid." 465 U.S. at 634 (footnote omitted). Here, in contrast, Congress has enacted specific statutes granting the Secretary broad authority to establish physical and mental qualifications for active duty personnel, and no federal agency has ever applied the Rehabilitation Act (or, for that matter, Title VI or Title VII) to private suits by uniformed members of the armed services.

In *Alexander* v. *Choate*, this Court rejected the argument that Section 504 reaches only purposeful discrimination because it concluded that Congress perceived discrimination against the handicapped to be most often "the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." 469 U.S. at 295. That ruling has no application to the issue presented here. To the extent that *Alexander* is instructive at all, its most relevant principle is that "[a]ny interpretation of [Section 794] must * * * be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." 469 U.S. at 299. For the reasons we have stated, allowing uniformed members of the armed forces to bring private suits would cause Section 504 to exceed "manageable bounds."

2. Petitioner briefly argues (Pet. 19) that his procedural due process rights were violated by the Secretary's decision to adopt a policy that reservists who have tested positive for the AIDS virus are ineligible for extended active duty except during a mobilization. This argument warrants no further review.

This Court has held that enlisted personnel may not maintain *Bivens*-type actions to recover damages from superior officers for alleged constitutional violations. *Chappell* v. *Wallace*, 462 U.S. 296 (1983). The Court's holding in *Chappell* is based on the recognition that "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." *Id.* at 305 (quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187-188 (1962)). See also *Rostker* v. *Goldberg*, 453 U.S. 57, 65-67 (1981); *Schlesinger* v. *Ballard*, 419 U.S. 498, 510 (1975); *Orloff* v. *Willoughby*, 345 U.S. 83, 93- 94 (1953).

In any event, petitioner's constitutional rights were not violated in this case. Petitioner had no property right in his continued assignment to the NRCR program. The rules governing that program expressly provide that assignments are of a temporary nature, that retention beyond the initial period is not "implied or guaranteed," and that the NRCR program "is not a career program." Pet. App. 27a. Thus, any unilateral expectation of continued employment petitioner may have had did not rise to the level of a property interest. Cf. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

Nor has petitioner shown that he was deprived of a protected liberty interest. Even assuming that the Navy's decision to bar petitioner from reappointment to the NRCR program could implicate a liberty interest if it were based on false and stigmatizing reasons publicized by the Navy, petitioner does not dispute that he in fact carries HIV anti-

bodies. Because petitioner failed to raise a "factual dispute * * * which has some significant bearing on his reputation," *Codd* v. *Velger*, 429 U.S. 624, 627 (1977), the courts below properly rejected his claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20374